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California Court Rules Teacher Tenure Statutes Unconstitutional

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On June 10, 2014, the trial court judge in *Vergara v. State of California* issued a decision striking down as unconstitutional five provisions of the California Education Code regarding public school teacher tenure procedures.¹ The plaintiffs, nine California public school students, argued that the five challenged statutes violate their fundamental rights to an equal education by adversely affecting the quality of the education they receive from the state.

In agreeing with the plaintiffs, the court pointed to evidence presented during trial that competent teachers are a critical, if not the most important, component of a child's educational success and that "grossly ineffective teachers substantially undermine the ability of that child to succeed in school." Pointing to specific evidence that the court deemed "compelling" and so persuasive "it shocks the conscious," the court cited a study finding that a year in a classroom with a grossly ineffective teacher costs students \$1.4 million in lifetime earnings per classroom. Another expert testified that 1-3% of teachers in California are grossly ineffective, which amounts to 2,750 to 8,250 grossly ineffective teachers in the state.

The court examined each of the challenged statutes and determined that the state defendants (State of California, Governor, State Superintendent of Public Instruction, California Department of Education, and State Board of Education) failed to meet their burden to establish that the State of California has a compelling interest justifying the challenged statutes' imposition of a disproportionate burden on the education of poor and minority students.

Tenure

The court found that both students and teachers are unfairly, unnecessarily, and for no legally justifiable reason disadvantaged by the current teacher tenure statute. California's teacher tenure statute calls for a two-year probationary period before a teacher attains tenure, during which time a school employer can choose not to reemploy the probationary teacher. The court noted that, while called a "two year" statute, this is a misnomer, as the period is actually several months shorter than two full school years because districts are required to make decisions as to which teachers to retain by March 15th of the second year of the teacher's employment. Evidence was presented that districts are not provided enough time to make informed decisions regarding

¹ Tenure (Cal. Ed. Code § 44929.21(b)), Dismissal (Cal. Ed. Code §§ 44934, 44938(b)(1) and (2), 44944 4), and Layoff (Cal. Ed. Code § 44955).

granting tenure. As a result, some teachers are being retained who otherwise would not have been had more time been provided for the process, while other potentially qualified teachers are not granted tenure because districts are unwilling to commit to such teachers when there is any uncertainty as to their competence. The court cited the testimony of two experts who agreed that a three- to five-year tenure track would be a better time frame to make the tenure decision for the mutual benefit of students and teachers. Nationwide, 32 states have a three-year tenure period, and nine states have a four- or five-year period; California is one of only five outlier states with a tenure period of two years or less. Four states have no tenure system at all.

Dismissal

The court also agreed with the plaintiffs that it is too time-consuming and expensive to go through the dismissal process required by the challenged statutes to terminate ineffective teachers. Evidence was presented that it can take anywhere from two to almost 10 years and cost districts \$50,000 to \$450,000 to dismiss a tenured teacher. The court determined that, given these facts, grossly ineffective teachers are left in the classroom because school officials do not wish to expend the time and financial resources necessary to investigate and prosecute these cases. One witness testified that dismissals are “extremely rare” in California because administrators believe it to be “impossible” to dismiss a tenured teacher under the current system. The court found this conclusion especially noteworthy given the estimate that 2,750 to 8,250 grossly ineffective teachers currently work in school districts across California.

Layoffs

The statute governing teacher layoffs mandates that the last-hired teacher is the first to be impacted when layoffs occur; no exceptions are provided based on teacher effectiveness. The court viewed this situation as “lose-lose” for the classroom and its students and constitutionally unsupported: “No matter how gifted the junior teacher, and no matter how grossly ineffective the senior teacher, the junior gifted one, who all parties agree is creating a positive atmosphere for his/her students, is separated from them and a grossly ineffective one who all parties agree is harming the students entrusted to her/him is left in place.” The court also reviewed other states’ teacher layoff procedures and found that 20 states provide that seniority may be considered among other factors; 19 states leave the layoff criteria to district discretion; two states provide that seniority cannot be considered; and only 10 states, including California, provide that seniority is a factor that must be considered.

The court concluded that substantial evidence supported that the challenged statutes disproportionately affect poor and minority students. High-poverty, low-performing schools, which are disproportionately attended by minority students, are more likely to employ a disproportionate number of underqualified, inexperienced and ineffective teachers. The court further found that the churning of teachers—also referred to as the “Dance of the Lemons”—affects high-poverty and minority students disproportionately.

The court issued an injunction barring enforcement of each of the challenged tenure statutes, but stayed imposition of the injunction pending exhaustion of the appeal process. The practical effect of the ruling is that the challenged laws will remain in place until this case has made its way through the court system, unless the Legislature acts sooner to amend the statutes.

Proposed revisions to teacher tenure statutes have historically died in the California Legislature; however, the court’s decision in *Vergara* may motivate legislators to act before the court’s injunction goes into effect. The California Legislature is currently considering several pieces of legislation related to the teacher tenure process, including Assembly Bill 1619 (tenure), Senate Bill (SB) 10 (dismissal), SB 453 (layoff), SB 559 (layoff) and SB 1164 (dismissal). Whether any of the proposed legislation will go far enough to address the specific deficiencies identified by the court remains to be seen. That said, given the probability of a lengthy appeal process related to the *Vergara* decision, the Legislature likely may attempt to fashion a legislative solution before the appeal process is exhausted.

Although the court’s decision in *Vergara* will not result in an immediate change in the law, the impact of this decision is already being felt within the education community and public sector labor unions. The decision is being hailed as a landmark victory for education reform advocates and as a stunning blow to teachers’ unions. The *Vergara* lawsuit was backed by Students Matter, an organization funded largely by David Welch, a wealthy Silicon Valley entrepreneur. Welch has vowed to pursue similar education litigation in other states and commentators agree that the court’s decision will likely spur legal attacks on tenure nationwide. The decision has been met with approval from the Obama Administration, with Education Secretary Arne Duncan calling the decision a “mandate” to fix the problems identified by the court nationwide and to reinvigorate the conversation about education reform.

Prominent teachers unions, on the other hand, have opined that the decision is misguided and stems from anti-union sentiment and a generalized attack on labor. Randi Weingarten, president of the American Federation of Teachers, called it “a sad day for public education” and claimed that the decision “strips the hundreds of thousands of teachers who are doing a good job to any right to a voice.”

With these diametrically opposing views, the battleground is set for a nationwide debate regarding teacher tenure, and the court ruling appears to be giving rise to a broader discussion about the role of public sector labor unions, particularly in the education context.

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